

DECISION



22848
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE:

DATE: August 20, 1982

B-206665

MATTER OF:

The FMI-Hammer Joint Venture

DIGEST:

1. Where the only evidence on a question of fact is conflicting statements by the agency and the protester, the protester has not met its burden of proof.
2. An agency's failure to confirm in writing an oral request for a best and final offer does not in itself warrant an objection to the contract award.

The FMI-Hammer Joint Venture protests an award by the Department of the Air Force to H.I. Homa Company under Request for Proposals (RFP) F66501-81-R-0056. The solicitation calls for the contractor to alter and repair two dormitory buildings at Howard Air Force Base in Panama. The protester complains that Homa improperly was allowed to displace it as the low offeror by changing its proposed price after the closing date for best and final offers. We deny the protest.

By letter dated January 5, 1982, the contracting officer requested best and final offers by January 7. Best and final offers were submitted by the protester and awardee. In its best and final offer, the protester significantly reduced its proposed price, making it the low offeror and, because award was to be based on price, placing it in line for award.

Subsequently, the Air Force determined that both proposals exceeded a funding limitation on the amount that could be spent on alteration of the buildings. The RFP advised offerors that the cost of alterations could not exceed \$100,000 for each building. Each proposed a price close to that amount. After reviewing the proposals, however, the Air Force discovered that

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the cost limitation applied to the combined alterations on both buildings. It therefore decided to reopen discussions, advise offerors of the error in the \$100,000 limitation, and conduct a new round of best and final offers. The discussions, which were initiated by calling each offeror to the activity and informally discussing the procurement, essentially involved suggesting ways for the offerors to reallocate their proposed alteration and repair costs so that the alteration proposals would not exceed the cost limitation.

Following these meetings, Homa modified its best and final offer by reducing its overall proposed costs as well as reallocating alteration and renovation costs. FMI-Hammer, however, simply submitted a reallocation of its cost elements without lowering its price. Homa, by lowering its price, displaced FMI-Hammer and was selected for award.

Protest

FMI-Hammer protests the procedure followed by the Air Force. FMI-Hammer states that it did not understand that the reallocation meeting was a reopening of discussions. FMI-Hammer asserts that no new best and final offer was solicited, and that it therefore believed that it could not revise its price, as well as reallocate its costs, in response to the meeting. FMI-Hammer argues that if the Air Force intended to permit new best and final offers, it should have followed the meeting with a written request. In this respect, Defense Acquisition Regulation (DAR) § 3-805.3(d) (1976 ed.) states that any oral notification of a call for best and final offers by a particular date must be confirmed in writing.

Air Force Response

The Air Force contends that FMI-Hammer should have known that negotiations had been reopened, because the meetings conducted with the firm covered more than proper cost allocation, and included understanding of the RFP's technical requirements. The Air Force asserts that FMI-Hammer was advised orally that it should submit a new best and final offer, and that, in any event, it should have treated an Air Force request for a response to the items mentioned at the meetings as a request for a new best and

final offer. In the circumstances, the Air Force contends, its failure to request new best and final offers in writing was not prejudicial to the protester and does not warrant objection to Homa's selection.

The Air Force, in support of its position, relies on our decision in Kappa Systems, Inc., 56 Comp. Gen. 675 (1977), 77-1 CPD 412. There we concluded that the protester was not injured by the Air Force's failure to provide written notification of the closing date for receipt of best and final offers because we found that the protester was advised of and given the opportunity to revise its proposal, a common cut-off date was set, and the protester should have known that further discussions after that date were not contemplated.

Discussion

The issue is whether the Air Force actually solicited a best and final offer from FMI-Hammer. If the Air Force did so, FMI-Hammer was charged with knowledge that it could respond by revising its offer in any way desired, including reducing the price. See Control Data Corporation and KET, Incorporated, 60 Comp. Gen. 548, 554-555 (1981), 81-1 CPD 531. If, however, the Air Force's request did not constitute the solicitation of a new best and final offer, so that FMI-Hammer had no opportunity to reduce its price, the Air Force could accept Homa's price reduction only after permitting FMI to revise its proposal also. See PRC Information Sciences Company, 56 Comp. Gen. 768 (1977), 77-2 CPD 11.

The problem in this case arises because the Air Force failed to comply with the requirement in DAR § 3-805.3(d) that an oral request for best and final offers be confirmed in writing. While this deficiency does not in itself necessarily warrant an objection to a subsequent award, Kappa Systems, Inc., *supra* at 686, the purpose of the regulation in part is to avoid misunderstandings regarding the responses desired of offerors following negotiations.

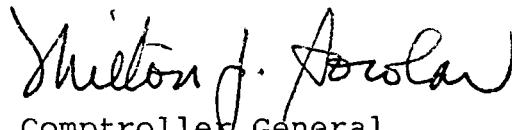
As indicated above, the parties disagree on precisely what the Air Force requested of FMI-Hammer. The Air Force is adamant that the request expressly was for a new best and final offer; the protester contends that the request

was, in effect, simply for reallocation of the alteration and repair costs it had offered, and that it was not advised, either directly or through reference to a new best and final offer, that it could lower these costs as well as reallocate them.

In this type of situation, we are constrained to accept the contracting agency's version of the facts. Del Rio Flying Service, Inc., B-197448, August 6, 1980, 80-2 CPD 92. The reason is that the protester has the burden of proof, and we will not consider that burden met where the only evidence is conflicting statements by the protester and the agency. System Development Corporation and International Business Machines, B-204672, March 9, 1982, 82-1 CPD 218 at p. 22.

Under the circumstances, we must accept the Air Force's position that it did request FMI-Hammer to submit a new best and final offer by the specified date. As a result, we conclude that FMI-Hammer in fact was afforded the same opportunity to reduce its proposed costs, as well as to reallocate them, as was Homa. Thus, the Air Force properly could accept Homa's price reduction, and since Homa's offer therefore was the more advantageous to the Government, we have no objection to the contract award.

The protest is denied. Nonetheless, we are recommending that the Air Force take steps to assure that its contracting officials confirm oral requests for best and final offers in writing as required by DAR § 3-805.3(d).



Acting Comptroller General
of the United States

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